Magic Finishing Company *and* Marie Van Dyke *and* Yvonne Davidson *and* Angela de Bres. Cases 7–CA–37777, 7–CA–37842(1), and 7–CA–37842(2)

February 27, 1997

DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On June 12, 1996, Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondent filed exceptions with a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The Respondent excepts to the judge's finding that it violated Section 8(a)(1) of the Act by discharging employees de Bres, Davidson, and Van Dyke for leaving work early without permission. It argues that although the employees were engaged in concerted activity when they left work early because of the admittedly oppressive heat, their activity was not protected. The Respondent relies on *Vemco, Inc. v. NLRB*, 79 F.3d 596 (6th Cir. 1996). We find no merit to this exception, and we find *Vemco* distinguishable from this case.

In *Vemco*, employees found their work area cluttered on a Monday morning because of weekend painting. The clutter made it impossible for them to do their work until it was removed, which removal would take about an hour. After discussions among themselves, nine employees left the plant. Each was later disciplined for this action. The court, reversing the Board, found that the employees' actions were not protected. It distinguished that case from *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), in which the Supreme Court found that employees who walked out rather than work in cold conditions were engaged in protected activity. In *Vemco*, the court found that the employees' activity was not protected because they were not required to work under the prevailing conditions; they were being paid for the time that they were not able to work; and they did not walk out to protest any company policy. By contrast, in the instant case, the employees *were* required to work under oppressive conditions, and they protested this by walking out. Operations Manager Borek, who discharged the employees for walking off the job without permission, admitted that she knew that the employees planned to go home because the previous shift had been allowed to go home early due to the heat; that the employees had complained to their foreman about having to work in unbearable heat; and that they had told the foreman that they were going home. Accordingly, the Respondent was aware that the employees were engaged in protected, concerted activity when they left work and it discharged them for engaging in that activity. The discharges thus were in violation of Section 8(a)(1) of the Act. *NLRB v. Washington Aluminum Co.*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Magic Finishing Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its facility at Grand Rapids, Michigan, copies of the attached notice marked 'Appendix.'[1] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 22, 1995."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise interfere with, restrain, or coerce Angela de Bres, Yvonne Davidson, and Marie Van Dyke, or any other employee for engaging in concerted activity for mutual aid or protection of employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Angela de Bres, Yvonne Davidson, and Marie Van Dyke full reinstatement to their former jobs or, if they no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Angela de Bres, Yvonne Davidson, and Marie Van Dyke whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Angela de Bres, Yvonne Davidson, and Marie Van Dyke and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

MAGIC FINISHING COMPANY

Brad Howell, Esq., for the General Counsel.
Robert J. Chovanec, Esq., of Grand Rapids, Michigan, for the Respondent.

DECISION

STATEMENT OF CASE

LOWELL GOERLICH, Administrative Law Judge. The charge in Case 7–CA–37777 was filed by Charging Party Marie Van Dyke, an individual, on October 13, 1995, and was served by certified mail on Magic Finishing Company (the Respondent) on October 16, 1995. The charge in Case 7–CA–37842(1) was filed by Charging Party Yvonne Davidson on October 30, 1995, and a copy was served by certified mail on Respondent on October 31, 1995. The charge in Case 7–CA–37842(2) was filed by Charging Party Angela de Bres on October 30, 1995, and a copy was served by certified mail on Respondent on October 31, 1995.

An order consolidating cases, consolidated complaint, and notice of hearing was issued on November 29, 1995. The consolidated complaint, among other things, alleges that the Respondent discharged three employees for ceasing work concertedly and for leaving Respondent's Grand Rapids facility in protest of their working conditions and for the purposes of mutual aid and protection in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The complaint came on for hearing at Grand Rapids, Michigan, on April 10, 1996. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of facts and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. BUSINESS OF RESPONDENT

At all material times the Respondent, a corporation with an office and place of business in Grand Rapids, Michigan (Respondent's Grand Rapids facility), has been engaged in applying finishes to automotive parts.

During the calendar year ending December 31, 1994, Respondent, in conducting its business operations described above, purchased and received at its Grand Rapids facility, goods valued in excess of $50,000 directly from points located outside the State of Michigan.

At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

Marie Van Dyke, Yvonne Davidson, and Angela de Bres worked on plastic line number three on the first shift. Van Dyke was a first coat sprayer, Davidson was an inspector-packer, and de Bres was a spray painter. The plastic line was a production line down which the objects to be spray painted flowed on hang racks. First the objects moved through a booth where they were given their first coat of paint; then they moved through an oven and then to a second booth where additional paint was sprayed on them; from there they passed through another oven to the inspector-packer.

It was a hot day on June 22, 1995. Indeed it was so hot that the second shift had been excused early. It was still hot when the first shift appeared at 7 o'clock. Toward 2 o'clock, the employees' breaktime, the heat became unbearable. The temperatures in the booths were 110 degrees and 107 degrees. The employees discussed the heat problem. De Bres told Davidson "that it was hot and muggy and I wasn't feeling well and I thought I should be able to go home." Davidson agreed. In a conversation among Davidson, Marcia Baker, Van Dyke, and de Bres it was observed that the heat was "unbearable" and they should be allowed to go home. Van Dyke was feeling dizzy and nauseous from the heat and the fumes from the ovens. Davidson stated to the other employees that she was "hot and sick and tired and needed to go home." Van Dyke said, "it affected me with being nauseated, because I was wiping the parts down with lacquer thinner before I painted them so it was making me nauseous." Besides discussing their own physical discomforts they observed that because the second shift had been excused because of the heat they also should be excused. The discussions culminated with the suggestion that the matter of leaving work be taken up with the foreman, Dennis Koppenaal. De Bres was chosen for such assignment.

De Bres met with Koppenaal about 1:50 p.m. According to Koppenaal, de Bres had complained earlier about the heat and the second shift's having been excused. "[S]he didn't think it was fair they had to work under the heat when the second shift had been allowed to go home early." At the

1:50 p.m. encounter, according to Koppenaal, de Bres said, "they were going home early because the heat was unbearable," and "if the second shift could leave because of the heat then they could leave too."

De Bres' version of what occurred differs from that of Koppenaal. According to de Bres, she told Koppenaal "that the heat was unbearable and Marie was feeling ill. So Marie Van Dyke, Yvonne Davidson, and myself was going to leave at two."[1] "He said that you girls have to do what you have to do, I know the heat's unbearable."

De Bres related the conversation with Koppenaal to Davidson and Van Dyke. They then left the Respondent's workplace together believing that Koppenaal had given permission for them to leave. When Operations Manager Sam Borek learned of the employees' leaving she immediately discharged them for "walking off job without telling supervisor or anyone in office."

The next morning the employees appeared for work. They met with Borek; Koppenaal was present. The employees asserted that they had left their jobs with Koppenaal's permission. Koppenaal denied that he had given them his permission. Borek chose to believe Koppenaal. The employees remained discharged.

On examination by the General Counsel, Borek conceded that she knew that the three employees had walked off the job; that de Bres had spoken to Koppenaal and told him that it was way too hot and they were going home; that she decided to fire the employees that afternoon because they left without obtaining the proper permission; that she knew they were leaving because of the heat. Borek also testified, "when I came into work that day, I heard that they were going to go home because second shift went home." Borek also testified that if employees asked to be excused because of the heat she "generally let them go." "[W]e don't have a problem with them leaving."[2]

Conclusions and Reasons Therefor

"Section 7 guarantees and § 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities . . . ." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). Thus the Respondent's employees on June 22, 1995, had the right protected by Section 7 of the Act to protest concertedly to their employer about their conditions of employment (here the unbearable heat) which they considered objectionable and to walk off the job in furtherance of their protestations if they so chose. The Respondent discharged the employees because it believed that they were exercising these rights. Thus the discharges were unfair labor practices. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

That the employees were under the impression that they had permission to leave is immaterial since the employer's action was taken for a reason which is unlawful under the terms of the Act. Cf. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). See also *United States Service Industries*, 314 NLRB 30 (1994), where it is stated: "It is sufficient that the company discharged an employee in the belief that he engaged in concerted activities for the purpose of mutual aid and protection."

Moreover, the Respondent has not shown that it would have discharged, Van Dyke, Davidson, and de Bres even in the absence of its belief that they had engaged in protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980).

I find that the discharges of Marie Van Dyke, Yvonne Davidson, and Angela de Bres was in violation of Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised here.

2. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By unlawfully discharging Marie Van Dyke, Yvonne Davidson, and Angela de Bres on June 22, 1995, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that the Respondent unlawfully discharged Marie Van Dyke, Yvonne Davidson, and Angela de Bres and has since failed and refused to reinstate them because of their protected concerted activities, in violation of Section 8(a)(1) of the Act, it is recommended that the Respondent remedy such unlawful conduct. It is recommended in accordance with Board policy[3] that the Respondent offer the employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary any employee hired on or since June 22, 1995, to fill any the positions, and make them whole for any loss of earnings they may have suffered by reason of the Respondent's acts herein detailed by payments to them of a sum of money equal to the amount they would have earned from the date of their unlawful discharges to the date of an offer of reinstatement, less net earnings during such period to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and including interest in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

[1] Marcia Baker did not leave because she did not have a ride home.

[2] Apparently the problem here was that the employees left together.

[3] See *Rushton Co.*, 158 NLRB 1730 (1966).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, Magic Finishing Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully discharging employees who exercise any rights guaranteed by Section 7 of the Act and protected by Section 8(a)(1) of the Act.

(b) In any other manner interfering with, restraining, or coercing any employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, to engage in self-organization, to bargain collectively through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection, or to refrain from any and all these things.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Marie Van Dyke, Yvonne Davidson, and Angela de Bres full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Marie Van Dyke, Yvonne Davidson, and Angela de Bres whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility at Grand Rapids, Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaints be dismissed insofar as they allege violations of the Act other than those found in this decision.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."